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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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BOB SEGALL,  
*Complainant,*

v.

INDIANA STATE DEPARTMENT OF HEALTH,  
*Respondent.*

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Formal Complaint No.  
18-FC-2

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana State Department of Health (“ISDH”) violated the Access to Public Records Act<sup>1</sup> (“APRA”). The ISDH responded to the complaint through the agency’s Director of Legal Affairs Preston Black. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on January 5, 2018.

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<sup>1</sup> Ind. Code §§ 5-14-3-1 to -10

## **BACKGROUND**

Bob Segall (“Segall”), Senior Investigative Reporter for WTHR, filed a formal complaint alleging the Indiana State Department of Health (“ISDH”) violated the Access to Public Records Act (“APRA”) by improperly denying access to public records unless WTHR pays a fee prior to inspection.

On June 14, 2017, Segall submitted a public records request to ISDH to inspect several email queries. The request indicated he would prefer inspection over copying. Ultimately, the search yielded several hundred pages of documents. At least the first 100 pages were provided free of charge, however, ISDH charged a fee for the rest, the rationale being that the records had to be printed first for redaction purposes. Segall argues the agency could have reviewed and redacted the records electronically and permitted inspection without the copy fee.

ISDH responded to the complaint by arguing that the agency currently lacks the technological capability to redact documents electronically. As a result, certain records must be printed out for redaction and then the ones requiring printing are released for a copy fee. ISDH claims Segall’s request encompassed over 1500 pages in total but only about a third were determined to be responsive. Coupled with the batch that was provided gratis, the total fee amounted to \$59.10 in total.

## ANALYSIS

This case presents the issue of whether the Access to Public Records Act (“APRA”) prohibits a public agency from recovering a copy fee from a requestor who seeks only to *inspect* certain agency email messages where the emails require redaction that the agency cannot execute without printing a hard copy of the email record first.

### 1. The Access to Public Records Act (“APRA”)

APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1. The Indiana State Department of Health (“ISDH”) is a public agency for the purposes of the APRA; and thus, subject to the Act’s requirements. Ind. Code § 5-14-3-2(n). As a result, any person has the right to inspect and copy the ISDH’s disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See* Ind. Code § 5-14-3-3(a).

#### 1.1 Copy Fees under APRA

Indiana Code section 5-14-3-8(b) provides that an agency may not charge a fee to inspect public records. Additionally, an agency may not charge a search, examination, or review fee to determine whether a record may be disclosed. Copies, however, may be charged a uniform fee by state agencies as

determined by the Indiana Department of Administration. This stands at the cap of \$.10 per page.

This Office has regularly opined that very few of the provisions in the APRA are absolute. It is, however, to be interpreted and applied liberally in favor of disclosure. To that end, APRA is also to be interpreted with practicality and with reasonableness in mind. When the legislature enacted Indiana Code section 5-14-3-8(b) in 1983 by Public Law 19-1983, SEC. 6, the legislature likely did not contemplate the ubiquity of electronic correspondence and the resulting impact on public access.

The purpose of a copy fee is not to be abused as an income stream or even to supplement agency coffers, but rather as a method of recoupment of costs. Paper and printing costs money, and while it is the duty of an agency to provide information, it is not necessarily free. After all, what one requester is receiving in the form of documentation, the tax base at large must ultimately pay for unless that cost is recouped.

That said, electronic information can most often be transmitted free of charge. Therefore, the APRA states that agencies must make reasonable efforts to provide disclosable data electronically. *See* Ind. Code § 5-14-3-3(d). The inverse being that an agency does not have to go to extraordinary lengths to provide public records electronically. In the current instance, the request sought electronic inspection of emails. Emails being digital information, it stands to reason that they could be forwarded free of charge. If the records require redaction, however, it would require additional—not necessarily unreasonable—effort to provide them electronically.

The parties do not contend that redaction was unnecessary but it goes without saying that a request for emails between department of health officials may contain protected health information or deliberative material. Mere inspection may not have been uniformly possible or practical. In fact, the original request alludes to the possibility that electronic inspection may not be possible.

Segall states there is redaction software readily available to ISDH that other agencies readily use. Some of the software is even available at no cost. ISDH does not have this software currently and the question becomes whether the agency must download new software to satisfy a request electronically or is the only available option to print out hard copies, redact them by hand and charge a fee for the cost of the paper.

While simply downloading a freeware redaction program may appear at first to be an easy solution, there are security protocols, licensing issues, and compatibility considerations to bear in mind. Whether overcoming those logistical challenges is “reasonable” is a matter of fact and unknown to this Office, but more than likely would require a significant review and approval from the Indiana Office of Technology.

From the information provided, it does not appear as if ISDH is imposing the fee as a barrier to access or even suggesting that no agency records could ever be inspected free of charge. It simply says that in this instance of 500+ emails about a controversial subject matter involving deliberations of top officials, redaction was necessary and it effectuated that redaction by the only available means. Because the agency incurred a cost for doing so, it charged back that fee to the Complainant.

To be sure, my recommendation stands that if practical, and if it can be done effectively and securely, all public agencies should explore technological solutions to redaction to save time and money. At this time, however, this is not a mandate but merely a suggestion.

## **CONCLUSION**

Based on the foregoing, it is the opinion of the Public Access Counselor that the Indiana State Department of Health has not violated the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt  
Public Access Counselor